



accepted that appellant sustained a compensable recurrence of disability beginning November 12, 1995. Appellant received appropriate wage-loss compensation. On October 16, 1996 she began working in the private sector as a data text operator. Appellant later claimed a recurrence of disability beginning November 8, 1999, which the Office denied.

On January 24, 2002 the Office granted a schedule award for 23 percent impairment of the right upper extremity.<sup>1</sup> However, the Branch of Hearings and Review set aside the schedule award on July 26, 2002. The hearing representative found that neither appellant's physician nor the district medical adviser provided an adequate explanation for their respective impairment ratings. The case was remanded to the Office with instructions to refer appellant for a second opinion evaluation to determine the extent of any right upper extremity permanent impairment.

Dr. Kenneth A. Falvo, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on October 24, 2002. Appellant's complaints at the time included intermittent right hand numbness. Dr. Falvo found five percent impairment of the right upper extremity due to symptoms of paresthesias in the right hand.

The Office issued a November 22, 2002 decision finding that appellant was not entitled to a schedule award in excess of five percent of the right upper extremity. By decision dated February 14, 2006, the Branch of Hearings & Review set aside the Office's November 22, 2002 decision. The hearing representative noted that Dr. Falvo had incorrectly referenced "A.M.A., *Guides*, [T]able 17-22" in his October 24, 2002 report. This particular table did not pertain to upper extremity impairment, but instead addressed lower extremity impairment due to knee ankylosis in flexion. Accordingly, the hearing representative instructed the Office to refer appellant for another second opinion evaluation.

On remand, the Office referred appellant to Dr. David I. Rubinfeld, a Board-certified orthopedic surgeon. In a report dated January 4, 2007, Dr. Rubinfeld found 10 percent impairment of the right upper extremity due to sensory deficit involving the median nerve. Dr. Rubinfeld's physical examination revealed normal range of motion in the wrist, no ankylosis, and no weakness or atrophy of the upper extremity. He specifically noted that motor strength was intact in the deltoids, triceps, biceps, forearm muscles and intrinsic muscles of both hands.

On February 13, 2007 Dr. Morley Slutsky, the Office medical adviser, reviewed the record, including Dr. Rubinfeld's report, and found eight percent impairment of the right upper extremity. He was of the opinion that Dr. Rubinfeld had committed a slight mathematical error in finding 10 percent impairment.

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<sup>1</sup> In a July 5, 2001 report, Dr. David Weiss found 34 percent impairment based on a combination of impairments due to pain, loss of grip strength and motor strength deficits involving the triceps and thumb abductors. The Office's medical adviser reviewed the record on January 10, 2002 and found 23 percent impairment. In contrast to Dr. Weiss' finding, the Office medical adviser did not include 11 percent impairment for triceps weakness because this deficit was unrelated to the median nerve, and therefore, unrelated to appellant's accepted condition of right carpal tunnel syndrome.

In an April 23, 2007 decision, the Office found that the evidence did not support an increase over the previously awarded 23 percent right upper extremity impairment. This decision was affirmed by the Branch of Hearings & Review on November 7, 2007.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>2</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>3</sup> Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>4</sup>

### **ANALYSIS**

Appellant's counsel argues that Dr. Weiss' July 5, 2001 impairment rating conforms to the A.M.A., *Guides* (5<sup>th</sup> ed. 2001) and thus, establishes a 34 percent impairment of the right upper extremity. Counsel also argues that Dr. Rubinfeld's 10 percent impairment rating cannot carry the weight of the medical evidence because it is impossible to determine how he arrived at his June 4, 2007 rating. Alternatively, appellant's counsel argues there is an unresolved conflict of medical opinion between Dr. Weiss and Dr. Rubinfeld, thus requiring referral to an impartial medical examiner. Lastly, counsel argues that in view of appellant's marital status, she should have received compensation at the augmented rate of  $\frac{3}{4}$  rather than  $\frac{2}{3}$ , which was the rate she received pursuant to the January 24, 2002 schedule award.<sup>5</sup>

The primary question is whether appellant presented probative evidence of impairment in excess of the 23 percent award she previously received. Dr. Weiss found a right upper extremity impairment of 34 percent. His overall rating included 20 percent impairment for loss of grip strength, 11 percent for motor strength deficit involving the triceps, and 3 percent for motor strength deficit involving the thumb abductors. Dr. Weiss also found three percent impairment for pain. Contrary to counsel's argument, Dr. Weiss' July 5, 2001 impairment rating does not conform to the A.M.A., *Guides* (5<sup>th</sup> ed. 2001). Upper extremity impairments secondary to carpal tunnel syndrome and other entrapment neuropathies should be calculated based on sensory and/or motor deficits.<sup>6</sup> Furthermore, when residuals of carpal tunnel syndrome are properly

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<sup>2</sup> For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2000).

<sup>3</sup> 20 C.F.R. § 10.404 (2008).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

<sup>5</sup> Appellant married on February 14, 1998.

<sup>6</sup> Section 16.5d, A.M.A., *Guides* 491-94; *Michelle L. Collins*, 56 ECAB 552, 556 (2005).

calculated, additional impairment values are not given for decreased grip strength.<sup>7</sup> Dr. Weiss also incorrectly awarded an additional three percent impairment for pain.<sup>8</sup> Because Dr. Weiss did not properly apply the A.M.A., *Guides* (5<sup>th</sup> ed. 2001), his July 5, 2001 impairment rating is of little probative value.<sup>9</sup>

In contrast, Dr. Rubinfeld applied the appropriate criteria for determining the extent of appellant's permanent impairment due to her accepted right carpal tunnel syndrome. He found 10 percent impairment due to sensory deficit involving the median nerve.<sup>10</sup> Dr. Rubinfeld indicated 20 percent severity for sensory loss, which corresponds to a Grade 4 classification under Table 16-10.<sup>11</sup> Sensory loss involving the median nerve (below midforearm) represents a maximum upper extremity impairment of 39 percent, as correctly noted by Dr. Rubinfeld.<sup>12</sup> The upper extremity impairment is obtained by multiplying the Grade 4 sensory deficit (20 percent) by the maximum upper extremity impairment for median nerve involvement (39 percent). Although Dr. Rubinfeld indicated 10 percent impairment, the district medical adviser correctly noted that the proper calculation would yield only an 8 percent impairment of the right upper extremity ( $.20 \times .39 = 7.8$  percent). Apart from this slight mathematical error, his June 4, 2007 impairment rating conforms to the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>13</sup>

Appellant's counsel criticized Dr. Rubinfeld's June 4, 2007 impairment rating because the doctor supposedly failed to assess muscle weakness, particularly with respect to appellant's right hand. Counsel's criticism is unfounded. Dr. Rubinfeld specifically noted that "motor strength was intact in the deltoids, triceps, biceps, forearm muscles, and intrinsic muscles of both hands." Appellant's counsel also alleged that Dr. Rubinfeld did not measure atrophy in the right upper extremity. To the contrary, Dr. Rubinfeld specifically noted that "arm and forearm circumferences were equal bilaterally." He also reported that appellant's hand examination revealed no thenar atrophy on the right. Moreover, in response to a specific question posed by the Office (Form CA-1303), Dr. Rubinfeld noted that there was no weakness or atrophy of the upper extremity as a result of wrist pathology.

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<sup>7</sup> "In compression neuropathies, additional impairment values are not given for decreased grip strength." Section 16.5d, A.M.A., *Guides* 494.

<sup>8</sup> The A.M.A., *Guides* limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, such as Chapters 13, 16 and 17, then pain-related impairments should not be assessed using the A.M.A., *Guides* 571, Chapter 18, Section 18.3b.

<sup>9</sup> *Richard A. Neidert*, 57 ECAB 474, 480 n. 20 (2006).

<sup>10</sup> Dr. Rubinfeld relied on Table 16-10 and Table 16-15 of the A.M.A., *Guides* 482, 492.

<sup>11</sup> A Grade 4 classification allows for a sensory deficit range of 1-25 percent. A.M.A., *Guides* 482, Table 16-10.

<sup>12</sup> See A.M.A., *Guides* 492, Table 16-15.

<sup>13</sup> The hearing representative believed Dr. Rubinfeld's reference to "20 [percent] severity of the sensory loss" was an "obvious typographical error." The hearing representative correctly noted that 25 percent was the maximum sensory deficit for a Grade 4 classification. By substituting 25 percent for the 20 percent noted by Dr. Rubinfeld, the hearing representative demonstrated how Dr. Rubinfeld could possibly have arrived at his 10 percent impairment rating ( $.25 \times .39 = 9.75$  percent).

For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>14</sup> As Dr. Weiss' July 5, 2001 impairment rating is of little probative value, no conflict exists between Dr. Weiss and Dr. Rubinfeld. Consequently, the case need not be referred to an impartial medical examiner as appellant's counsel urges. Dr. Rubinfeld found 10 percent impairment and appellant has already been compensated for 23 percent impairment of the right upper extremity. Appellant has failed to present any credible medical evidence establishing a permanent impairment in excess of the 23 percent impairment she has already been paid.

### **CONCLUSION**

Appellant has not demonstrated that she has greater than 23 percent impairment of the right upper extremity.<sup>15</sup>

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 7, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>15</sup> The issue of entitlement to augmented compensation is moot given that appellant has already received payment for a schedule award (23 percent) that is well in excess of what the current medical evidence indicates she is entitled to receive.